Supreme Court, U.S.
FILED

051321 APR 12 2006

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No.

IN THE

Supreme Court of the United States

CHARLES RUDD MACKENZIE,

Petitioner,

-v-

W. DENIS DONOVAN AND THE COMMUNITY PRESERVATION CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

DAVID OTIS FULLER, JR.
Counsel of Record
BOSWORTH, GRAY & FULLER
116 Kraft Avenue
Bronxville, NY 10708
(914) 337-3626

Counsel for Petitioner

THE REPORTER COMPANY, *Printers and Publishers, Inc.*
30 Vesey Street, New York, NY 10007--212-732-6978
(8896 – 2006)
Printed on Recycled Paper

QUESTIONS PRESENTED

1. Did the courts below violate the petitioner's right to due process by imposing criminal sanctions because of his inability to pay a civil debt?

2. Did the respondent Judge Donovan violate petitioner Mackenzie's constitutional rights by finding him guilty of criminal contempt in the absence of any evidence that petitioner's failure to pay a civil debt was due to willfulness, as opposed to inability?

3. Should the criminal contempt conviction be reversed because contrary to this Court's precedents, respondent Judge Donovan, despite demonstrated hostility to petitioner, heard the case instead of transferring it to a disinterested, unbiased judge?

4. Did the trial court deprive Mackenzie of the trial that due process of law requires for a criminal contempt conviction?

5. Did the respondent Judge Donovan violate Mackenzie's constitutional right against being compelled to testify against himself by using an order to show cause in a criminal contempt proceeding?

6. Did the respondent Judge Donovan violate Mackenzie's constitutional right to due process of law when he summarily found Mackenzie guilty of deceit within the meaning of New York Judiciary Law §487, without a hearing or trial, and imposed treble damages, despite material issues of fact?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6 petitioner states that he has no parent companies or non-wholly-owned subsidiaries.

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OPINIONS BELOW

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JURISDICTION

The Appellate Division's orders were entered on January 24, 2005 and November 7, 2005. (App., *infra*, 30a-31a, 3a-5a) A timely motion for leave to appeal to the New York Court of Appeals was denied as to both orders on January 17, 2006. (App., *infra*, 1a-2a). An earlier timely motion for leave on the first order had been dismissed on March 31, 2005 as not having finally determined the action within the meaning of the New York Constitution. (App., *infra*, 28a-29a). A timely motion for reargument of that dismissal was denied on June 16, 2005. (App., *infra*, 26a-27a). The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution provides in relevant part: "This Constitution, and the Laws of the United States *** shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl.2.

The Fifth Amendment to the Constitution provides in relevant part: "No person ... shall be compelled in any criminal case to be a witness against himself..." The Sixth Amendment to the Constitution provides in relevant part: "In all criminal

prosecutions, the accused shall enjoy the right to a speedy and public trial..."

The Fourteenth Amendment to the Constitution provides in relevant part: "No state shall ... deprive any person of life, liberty, or property, without due process of law."

Section 487 of the New York Judiciary Law provides in relevant part:

> "§487. Misconduct by attorneys
> An attorney or counselor who:
> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party.***
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action."

Section 750 of the New York Judiciary Law provides in relevant part:

> "§750. Power of courts to punish for criminal contempts
> A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others: ***
> 3. Wilful disobedience to its lawful mandate.***"

STATEMENT

A. The Criminal Contempt Conviction

In an April 28, 2003 decision and order (See appendix, *infra* 39a-44a), the trial judge, respondent W. Denis Donovan

("Donovan"), ordered the client of petitioner Charles Rudd Mackenzie ("Mackenzie") to restore the funds, received over one and one-half years earlier pursuant to Donovan's previous default judgment, to the Westchester County Treasurer in a mortgage foreclosure action (23-4).[1] Mackenzie had started the foreclosure action, his first, when he had been practicing law for a little more than three years (406).

Almost two months later, on June 18, 2003, the court called the attorneys into a conference in open court and on the record (636-42). During the conference, counsel for respondent The Community Preservation Corporation ("CPC") informed Donovan that Mackenzie had retained some of the surplus monies as attorney's fees. Mackenzie acknowledged this but explained that he no longer had the fees because he had paid income taxes and spent the money some time ago (646-8). On Thursday, June 19, 2003, the court ordered him to pay restitution in the amount of almost $80,000 to the county treasury by the next Monday at 10:00 AM (June 23, 2003) (649). It also ordered Mackenzie to deliver documentation concerning his fee that afternoon and to appear that Monday, or there would be a warrant for his arrest (655).

Mackenzie appeared as ordered on Monday and informed Donovan that he could not pay the $79,534.42 (662). He said that if he had the money he would pay it (663). Donovan, the trial judge, said that he was "fuming" as he read the papers because he "knew he had been taken" by Mackenzie and his clients (689). He stated that "somebody is going to go to jail for larceny someplace along the line, I think. However it's done. Somebody is in deep doo-doo." (693). Mackenzie had said that he would not risk his "career by disobeying intentionally an

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[1] The numbers in parentheses refer to pages of the record on appeal in the Appellate Division (Case No. 2003-09151)

order of this Court" (663), but suggested that the court adjourn the matter until July 31, 2003 when his client's mother would be back and that he and his client would be subject to an injunction as to any dissipation of funds (695-6). Donovan said that he had a "more efficient" way; rather than use the civil power of the court, he chose to issue a notice to Mackenzie that he was charged with willful disobedience of a lawful mandate of the court (697). He served Mackenzie with such a notice under New York Judiciary Law §750, §751, and orally ordered Mackenzie to show cause on July 10, 2003 why the court should not punish him for criminal contempt. He also orally ordered Mackenzie "to bring a toothbrush if you don't come up with an appropriate answer." (698).

On July 8, 2003, Mackenzie presented four checks totaling $27,451.08 and filed a comprehensive affidavit with exhibits showing his inability to pay the ordered restitution, stating that he had paid approximately $40,000 in income taxes for the year 2001 and most of the rest for bills, detailing his assets and income with bank statements of May and June, 2003, that he owned no real estate and stating that he had liquidated all his investments and savings and paid them to the County Treasury (609-634). He added that the fees in question had been disbursed to him on or about November 2, 2001, about one year and eight months earlier (610). He had liquidated all his assets except for one stock that would cost more to liquidate than what he would realize from the sale (611). His professional insurance carrier had denied coverage. He stated his intention to pay the remaining restitution from his future income. (612). He "respectfully" asked that based upon this disclosure, the court rule that he had not willfully disobeyed the court's order to return the entire amount and respectfully requested the Court to extend his time to pay the balance (613).

On July 10, 2003, the return date of the oral order to show cause (26-7), Donovan summarily found Mackenzie in criminal

contempt and sentenced him to the maximum term of thirty days in jail. Without making any findings or specifying any reasons, Donovan reduced his ruling to writing on August 1, 2003, finding the answers provided by Mackenzie to be an "insufficient and inadequate explanation for his failure to obey the lawful order of this Court" which was to produce in court the entire amount of his fee received out of the funds Donovan had previously ordered released from the Westchester County Treasury (733-4).

The court served Mackenzie with a copy of the order, dated August 1, 2003 (App., *infra*, 32a-35a), and issued a warrant of commitment (App., *infra*, 36a-38a) which required a maximum term of thirty days, "the maximum permitted by Court," and included a fine of two hundred fifty dollars (736-740). Petitioner requested a stay of the warrant of commitment due to 25 cases he had to handle that month that would otherwise have to be adjourned, including a trial in Supreme Court, Westchester County. Rather than allow the petitioner to earn income on these cases from which he might further be able to reimburse the treasury, Donovan denied the request and ordered Mackenzie taken into custody forthwith (740-1). The petitioner also had an airline ticket to Spain, paid for before these matters came about, that he was unable to use because of the incarceration. (61-2, 65-6).

Respondent Donovan, again without specifying any reason, said that the evidence was sufficient to find willfulness and that there was evidence to support the conclusion that Mackenzie's failure to comply was willful, despite the lack of any such evidence in the record. There was no mention of the required standard of review, proof beyond a reasonable doubt, which is mandated by this Court for a conviction for criminal contempt. In the Appellate Division, Second Department, the petitioner raised the constitutional issues brought before this Court; that there should have been no criminal contempt for inability to

pay, that the trial court should have transferred the case to another, disinterested judge, that the trial court deprived Mackenzie of a plenary hearing and that the order to show cause procedure violated his right against self incrimination. The Appellate Division, without specific reference to the record, stated that there was evidence to support the conclusion that his failure to comply with the underlying order was willful and stated that the remaining contentions were without merit. See opinion at App., *infra,* 30a-31a. The petitioner raised the same contentions before the New York Court of Appeals and leave to appeal was denied on January 17, 2006.

The courts below did not appear to apprehend the inappropriateness of the criminal contempt power for enforcing a third-party claim without any evidence of willfulness or the other safeguards required for a criminal proceeding.

B. The Summary Finding of Deceit and Awarding of Treble Damages

The conviction of criminal contempt arose out of the following proceedings.

In October of 1998, petitioner Mackenzie, a sole practitioner, brought an action that sought, among other things, foreclosure of a mortgage and a declaration that an alleged fraudulent satisfaction of said mortgage be declared null and void (R160-171).[2] (Papa v. Papa, et al., Index No. 98-16220), Supreme Court of the State of New York, Westchester County. The action was one of three related actions in which petitioner appeared as counsel. Before filing, Mackenzie ordered a title report/foreclosure search report listing the current lienholders.

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[2] The numbers in parentheses in this section preceded by an "R" refer to pages of the record on appeal in the Appellate Division (Case No. 2004-10735)

The title report did not name respondent CPC in its certified list of current lienholders (R229-30). Mackenzie lacked practical experience as a litigator (R233). He had been practicing a little more than three years and this was his first foreclosure action (406).

While the action was pending, Mackenzie moved on behalf of his client to intervene and file an answer in another action, Federal National Mortgage Association v. 24 Caryl Avenue Realty Co. (Index No. 98-12578), a first mortgage proceeding against the same mortgagor as in Papa v. Papa, et al., Index No. 98-16220, commenced earlier that year in the same courthouse. Petitioner's motion was denied (Bellantoni, J.) on March 31, 2000 because the court found that the movant had submitted no evidence in admissible form establishing that he had any interest in the property being foreclosed or that he was a necessary party (R72-3). The court was apparently working from an unsigned courtesy copy of the motion papers and had misplaced the original signed affirmation, thus effectively denying the motion on procedural grounds rather than on the merits (407).

On May 26, 2000, Fannie Mae cross-moved in the first action (Index No. 98-16220) for summary judgment dismissal of the first cause of action in opposition to petitioner's client's motion for an extension of time to serve another defendant. While the cross-motion was pending, the plaintiff and Fannie Mae entered into a stipulation discontinuing the action against Fannie Mae. Although the discontinuance rendered Fannie Mae's cross-motion to dismiss the first cause of action academic, the Court denied plaintiff's motion for an extension on July 20, 2000 and nonetheless granted Fannie Mae's cross-motion for summary judgment dismissal of the first cause of action on the merits, finding the Papa mortgage satisfied of record (R74-5). On May 10, 2004, the Appellate Division dismissed petitioner's client's appeal from that decision as academic because the plaintiff had thereafter discontinued or settled his claims against the

remaining defendants, effectively terminating the litigation, 7 AD 3d 594, 777 NYS 2d 147 (2nd Dept. 2004).

Before that decision and order (R74), petitioner, on behalf of his client, brought a second action, the one below (Index No. 00-9221), on June 16, 2000, seeking foreclosure of the mortgage and such other relief as the court might deem just and proper (R172-9). The court clerk's office accepted petitioner's request for judicial intervention (RJI) form, which Mackenzie had inadvertently left incomplete with regard to related cases. Mackenzie affirmed that this failure to fill out the RJI completely was an inadvertent mistake due to his lack of practical experience as a litigator. Although the RJI did not refer to any related actions, paragraph 23 of the second complaint (Index No. 00-9221) itself explicitly referred to the pending earlier action, the only other action his client had commenced, by index number (Index No. 98-16220) (R176, R180-1, R228-9, R233), and Mackenzie's affirmation, dated June 21, 2001, in support of distribution of surplus monies disclosed the related action brought by Federal National Mortgage Association against 24 Caryl Avenue Realty Co. (325).

On March 29, 2001, respondent CPC filed a notice of claim to surplus monies in the Fannie Mae first mortgage action (Index No. 00-9221), but did not serve Mackenzie's client in this action or notify Mackenzie about the notice of claim until March of 2003 (R230). On April 13, 2001, petitioner wrote to respondent CPC and the other parties to that action seeking consolidation of that action with the action below (R182-4). No agreement to consolidate was reached.

On October 26, 2001, Mackenzie obtained $229,290.58 for his client through a default judgment issued by respondent Donovan, the trial judge, of which he received $79,524.42 for legal fees and disbursements (R17, R36). Before ordering distribution of the surplus moneys, the court was required, by

reference or otherwise, "to ascertain and report the amount due to [claimant] or any other person who has a lien on such surplus moneys, and the priority of the several liens thereon..." New York Real Property Actions and Proceedings Law §1361(2). Respondent Donovan and the referee, however, failed to ascertain CPC's lien disclosed in the referee's report (339-40, 350) as required by the statute.

On April 28, 2003, respondent Donovan granted, without a hearing, CPC's motion to intervene, and vacated the default that resulted in the October 26, 2001 turnover order of the funds and directed petitioner's client to return the funds received over one and one-half years earlier to the Westchester County Treasurer to help satisfy CPC's claim (R70-71).

On or about June 17, 2003, CPC filed a third-party complaint against Mackenzie personally seeking treble damages under Judiciary Law 487 (R46-55). Mackenzie filed an answer with affirmative defenses and counterclaims, dated October 8, 2003 (R56-67). By motion dated November 11, 2003, CPC cross-moved for summary judgment and a dismissal of the counterclaims (R26-45). Mackenzie opposed the cross-motion, explaining in detail how any actions he had taken were inadvertent and due to his inexperience in complex civil litigation, not deceptive in nature (R225-244). He listed ten issues of material fact (R228-234). The motion and cross-motion were decided upon submission of papers only and without a hearing. The court referred to "findings" in an earlier proceeding (R22-31), but they, too, had been made without a hearing. On February 11, 2004, Donovan granted CPC's cross-motion (R14-25) and on April 1, 2004, entered judgment (R8-11). Without any hearing or trial, Donovan found Mackenzie "guilty of deceit" (R24) and imposed on him a penalty of over $400,000, in treble damages.

In the Appellate Division, the petitioner argued that if the finding of deceit was considered civil instead of criminal, the trial court should have accorded him a trial on the question of deceit when there were material issues of fact outstanding. The Appellate Division simply listed facts that it held entitled the claimant to surplus funds and stated that petitioner had failed to raise a triable issue of fact in response. It did not deal with the issues of fact raised by the petitioner on the issue of deceit and consequent treble damages. The issue of whether the claimant's entitlement to the surplus monies was due to actions based on inexperience or deceit was left unresolved, to the detriment of the petitioner in being assessed treble damages without a hearing. See opinion at App., *infra,* 6a-25a. In the Court of Appeals, Mackenzie raised the same issue and leave to appeal was denied on January 17, 2006.

REASONS FOR GRANTING THE PETITION

A. The Criminal Contempt Conviction

1. The Courts Below Violated the Petitioner's Right to Due Process by Imposing Criminal Sanctions Because of His Inability to Pay a Civil Debt

It is clear from the record that the petitioner did not have the funds to pay the almost eighty thousand dollars that the trial court ordered him to pay back in a civil mortgage foreclosure action. Because he did not pay the entire funds, the court found him in criminal contempt and sentenced him to the maximum term of thirty days' imprisonment.

The general rule is that money judgments are enforced by execution rather than by resort to the contempt power of the courts. Aetna Cas. & Sur. Co. v. Markarian, 114 F. 3d 346, 349, n. 4 (1st Cir. 1997). Even though the trial court below insisted on resorting to its contempt power, the authority of this Court

demands that it have used civil rather than criminal contempt because the purpose was to restore funds to the county treasury for the claimant, not to vindicate the authority of the court. Mine Workers v. Bagwell, 512 U.S. 821, 827-8 (1994). Of course, as shown below, there was no evidence of willfulness to support the finding of criminal contempt in any case.

Moreover, the principle that a person may not be imprisoned for civil debt reaches back into the 19th Century. The shocking practice of imprisonment for debt was branded an "Old World anachronism which had no place in a republican society of virtuous, free men," and disappeared. Coleman, Peter J., Debtors and Creditors in America, Insolvency, Imprisonment for Debt and Bankruptcy, 1607-1900, Washington, D.C.: Beard Books, 1999, p. 257, 268. By having convicted the petitioner of a crime and imprisoning him for not having the wherewithal to pay the civil amount ordered, respondent Donovan violated the above basic principles.

2. *No Evidence of Willfulness for Criminal Contempt, Failure of Proof as a Matter of Law*

This case concerns a severe abuse of the contempt power. This Honorable Court should hear this case and rule that a lawyer may not be convicted of criminal contempt and imprisoned when there is no evidence of willfulness. In effect, petitioner Mackenzie was sent to prison for being a debtor unable to pay a large lump sum in a short period of time. After respondent Judge Donovan found petitioner Mackenzie, an attorney in sole practice, who started his first mortgage foreclosure after practicing a little over three years (406), was not entitled to a fee received over a year and a half earlier, Donovan ordered him on a Thursday to return the $79,534.42 to the County Treasury on the following Monday morning, one business day later (649, 662). Mackenzie filed a comprehensive statement of net worth with exhibits demonstrating his financial

inability to pay the ordered restitution, detailed his assets and income, presented four checks totaling $27,451.08, and advised the court that he had paid his current life savings to the County Treasury (609-34). There was no evidence that he could pay the balance of over $50,000. Mackenzie's financial inability to pay the funds could not have been willful because as he testified, he did not have the money and there was no evidence that he did have it. There was nothing to show that Mackenzie "willfully" disobeyed Donovan's order. Even though the respondent judge chose to disbelieve Mackenzie's testimony, there was no other evidence on the accuser's side that the judge could use to convict Mackenzie. Yet, rather than give Mackenzie the additional time to pay requested, the respondent judge found Mackenzie guilty of criminal contempt and sentenced him to thirty days in jail (65-7). Mackenzie does not contend that the funds should not be restored. He states that because he did not have the funds then, he should not have been adjudged guilty and jailed for not paying them back right away.

This Court has consistently held that a conviction in a criminal proceeding must be supported by proof beyond a reasonable doubt. Hicks v. Feiock, 485 U.S. 624, 637 (1988). See Mine Workers v. Bagwell, 512 U.S. 821, 826 (1994), Mullaney v. Wilkes, 421 U.S. 684, 704 (1975). That standard did not even begin to be met in this case. Without identifying any evidence of financial ability to comply, the Appellate Division simply affirmed a finding of criminal contempt which was in conflict with this Court's rulings. It relied on its own recent untested precedent that, contrary to this Court's ruling, shifted the burden of proof in a criminal contempt to the defendant. Ferraro v. Ferraro, 272 AD 2d 510, 512, 708 NYS 2d 438, 440 (2d Dept. 2000). Counsel for respondent Donovan likewise argued before the Appellate Division that petitioner's failure to pay the entire fee shifted the burden of proof to petitioner (br. p. 29). This Court has always insisted that the burden is on the accuser to prove guilt in a criminal case beyond

a reasonable doubt. The burden never shifts in a criminal case in this country, even in a criminal contempt proceeding.

It is essential that this Court reaffirm its rulings that criminal contempt cannot be sustained without proof beyond a reasonable doubt of willful disobedience to a court's order. Here, as a matter of law, there was not any proof, whatsoever, of willful disobedience of a court order. The evidence of willfulness was not only legally insufficient, it was non-existent.

Criminal contempt of court constitutes a misdemeanor in the State of New York. No one, including an officer of the court, should be jailed and convicted of a misdemeanor in this country without evidence of willful disobedience. An attorney's sworn, demonstrated inability to pay nearly six figures within one business day must be accorded due deference as a complete defense, where there is no evidence to the contrary.

3. Right to an Unbiased Judge in a Criminal Contempt Proceeding

This Court has held, as a matter of constitutional law, that convictions for criminal contempt are indistinguishable from ordinary criminal convictions because their impact on the defendant is the same. Bloom v. Illinois, 391 U.S. 194, 201 (1968). Accordingly, a defendant in a criminal contempt proceeding has a right to a "public trial before an unbiased judge." Bloom v. Illinois, supra, at 205, citing In re Oliver, 333 U.S. 257, 276-7 (1948). Yet the judge who decided Mackenzie's case had embroiled himself in a controversy with Mackenzie, having declared in open court that he had been "taken" by Mackenzie and was "fuming" as he read the papers (689). Donovan threatened Mackenzie unnecessarily (655), joked about a forfeited vacation (66), and predicted a jail term before the hearing (693). The fact that Donovan chose a criminal remedy for an underlying civil demand for a return of funds

reflected an adverse feeling against Mackenzie prior to the proceeding. This Court has pointed out that the contempt power is uniquely liable to abuse, that perceived contumacy can often strike at the most vulnerable qualities of a judge's temperament and that the fusion of the legislative, executive and judicial powers in one person can lead to tyrannical behavior. Mine Workers v. Bagwell, 512 U.S. 821, 831 (1994).

Following this Court's analysis in Taylor v. Hayes, 418 U.S. 488, 501-2 (1974), the judge was embroiled in a running controversy with the petitioner attorney so that "as the trial progressed, there was a mounting display of an unfavorable personal attitude toward petitioner, his ability, and his motives, sufficiently so that the contempt issue should have been finally adjudicated by another judge." Similarly here, Judge Donovan's adjudicating the proceeding against Mackenzie, despite such extreme bias toward Mackenzie, was patently a violation of his constitutional rights. The record shows that Judge Donovan had already made up his mind to punish him for other reasons before even charging him with criminal contempt. Having another judge determine the case would have protected the petitioner against the arbitrary exercise of official power. Bloom v. Illinois, supra, at 202. This principle in our system of justice of unbiased adjudication as declared by this Court must be honored. The extreme level of bias shown by the trial court judge makes this case particularly worthy of review.

4. *Constitutional Right to a Full Trial with Accuser's Burden of Proof*

The proceeding below, brought on a return date of an order to show cause, was an inquisition of Mackenzie, the accused, limited essentially to the accused's testimony [(there were two county officials who informed the trial court about the funds the petitioner paid back (33-9)] and his financial affidavit, that did not support a finding of willfulness. The return date proceedings

fell far short of the full trial required by this Court's rulings on constitutional law.

This Court has held that the proper procedure for affording the accuser an opportunity to meet the burden of proof beyond reasonable doubt is not a summary hearing on a motion return date, but rather a full, fair, plenary trial. Bloom v. Illinois, 391 US 194, 205 (1968), citing In re Oliver, 333 US 257 276-7 (1948). Any process that in effect requires the accused to prove his own innocence violates basic due process of law and must be reversed as unconstitutional. In the event a court charges a person with criminal contempt *sua sponte*, it is the court's burden, at a full and fair trial, to rebut financial inability to comply with the court mandate.

Here, Mackenzie asserted by testimony and a comprehensive sworn statement that he did not have sufficient assets to satisfy Donovan's order. Yet, Mackenzie was not granted a trial, and the trial court did not attempt to meet its burden of proof as the charging party. The trial judge presided as self-declared victim, accuser, prosecutor and finder of fact. See Mine Workers v. Bagwell, 512 U.S. 821, 831 (1994). That an attorney was convicted and jailed without a plenary hearing makes review of this case by this Court essential.

5. *Right Against Self-incrimination*

Donovan compelled Mackenzie, by an oral order to show cause, to testify at a criminal proceeding wherein Mackenzie was the accused. Mackenzie had no choice but to respond. If he had not responded with testimony, Mackenzie would have been in grave danger of being held in contempt, convicted of a crime, and subject to professional discipline. Indeed, Donovan had declared that if he did not have a satisfactory explanation, Mackenzie should bring a "toothbrush" (698). As it was, Mackenzie's testimony did not incriminate him, but the court found him guilty anyway. Donovan's ordering him to show

cause why he was not in criminal contempt violated the right against self-incrimination found in the Fifth Amendment to the United States Constitution. The order constituted compelling an accused to testify in a criminal proceeding. Preserving an accused's right against compulsory testimony is fundamental to our constitutional system of government. See Bloom v. Illinois, 391 US 194, 205 (1968); Mine Workers v. Bagwell, 512 U.S. 821, 826 (1994).

Petitioner respectfully urges this Honorable Court to reaffirm and apply the right against criminal conviction and imprisonment for debt, the proper standard of proof necessary for a criminal conviction, the right to an unbiased judge, the right to a plenary hearing, and the right against self incrimination, rights denied to him by the courts below.

B. Summary Finding of Deceit and Imposition of Treble Damages Without a Hearing Despite Issues of Fact

The trial court found, as a matter of law, without a hearing, that Mackenzie was guilty of deceit within the meaning of Section 487 of the Judiciary Law and granted treble damages to respondent CPC which amounted to over $400,000 (R11). Section 487 provides in relevant part that:

> "An attorney or counselor who:
> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or, ***
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefore by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action."

Literally, the statute reads that the trial court's finding of deceit results in a criminal conviction as well as treble damages.

The Appellate Division declared that civil damages were the only consequence. Mackenzie argued on appeal that, in any case, the civil standard of a material issue of fact of deceit should have precluded summary judgment, citing New York Civil Practice Law and Rules 3212. Likewise, in his opposition to the motion for summary judgment in the trial court, Mackenzie identified ten issues of fact that had not been resolved at a hearing or trial (R228-34). Some were:

1. Whether Mackenzie intentionally deceived the court (R228).
2. Whether he thought that by seeking a declaration that the alleged satisfaction was fraudulent in the first foreclosure complaint, he had satisfied the requirements (R166, R170, R229).
3. Whether he had misunderstood the language in the request for judicial intervention (RJI) (R180, R233-4). Mackenzie did not fill in the part about insurance or other cases. He later explained that he thought they both had to do with insurance (R233). The Court can take judicial notice that the portion of the RJI in question has since been clarified.
4. Whether he had mistakenly relied on an erroneous title report (R229-30). Although CPC claimed that Mackenzie was aware of CPC's claim (R35-6), Mackenzie affirmed that he relied on the title report certifying that CPC was not among the current lienholders to be served (R229-30). He had only been practicing law for a little over three years and this was his first foreclosure case (406).

In his decision and order, respondent Donovan conceded that whether Mackenzie intended to deceive was an issue, but concluded that intent to deceive could be inferred from Mackenzie's purported conduct (R22). Donovan, then, most significantly, drew conclusions regarding Mackenzie's conduct

(R22-3) that directly contradict the record of Mackenzie's conduct (R170, request that the satisfaction be declared null and void; 325, disclosure of Fannie Mae action; 340, referee certification; 406, reliance on a foreclosure search report; 409-10, 557, disclosure to respondent CPC; 548, disclosure of first action.)

Deceit, by itself, or when identified as the basis of a criminal conviction or civil judgment, required proof of intent to mislead to distinguish it from mere mistake or misunderstanding. Intent to deceive is a factual issue. See Equitable Life Ins. Co. v. Halsey, Stuart & Co., 312 U.S. 410, 420 and 424 (1941); Lord, et al v. Goddard, 54 U.S. (13 How.) 198, 210-11 (1851). Mackenzie, a sole practitioner, may well have acted incompetently through lack of experience rather than deceitfully. This is an issue of fact that can be resolved only after an evidentiary hearing and was not dealt with by the courts below. The Appellate Division expressly stated that respondent CPC was deprived of the benefit of the surplus funds. It then jumped from that to the conclusion that CPC was entitled to treble damages, completely omitting the issue of deceit which governed the awarding of treble damages. The nature of deceit, a state of mind, compels the conclusion that its presence or absence is an issue of fact, not of law, contrary to what the trial court and Appellate Division found below.

Mackenzie's actions all took place without court supervision. It was not as though he had been ordered not to do something and then disobeyed. All of Mackenzie's actions took place over a year and a half before the court intervened. Another New York trial judge wrote that "section 487 of the Judiciary Law must be carefully reserved for the extreme pattern of legal delinquency, which falls within the restrictive contemplations of that statute." Wiggin v. Gordon, 115 Misc. 2d 1071, 1072, 455 NYS 2d 205, 207 (Civ. Court, Queens, 1982.) The Appellate Division, First Judicial Department, followed this decision in Schindler v.

Issler & Schrage, P.C., 262 AD 2d 226, 228, 692 NYS 2d 361, 362 (1st Dept. 1996); mot. lv. dis ., 94 NY 2d 791; mot. rearg. den., 94 NY 2d 859 (1999). The Appellate Division, Second Judicial Department cited Schindler in its opinion below [23 AD 3d 361-2, 804 NYS 2d 112-3 (2d Dept. 2005)], but did not follow the Wiggin, v. Gordon standard in petitioner's case. Such a standard demands a hearing.

With such an unusual statute and such a large penalty at stake, petitioner respectfully submits that this Honorable Court address the question of whether, as a matter of due process, an evidentiary hearing was required.

CONCLUSION

This Honorable Court should grant Mackenzie's petition for a writ of certiorari.

Respectfully submitted,

Dated: April , 2006
Bronxville, New York

DAVID OTIS FULLER, JR.
Counsel of Record for Petitioner
Charles Rudd Mackenzie
BOSWORTH, GRAY & FULLER
116 Kraft Avenue
Bronxville, NY 10708
914-337-3626

TO: Eliot Spitzer
Attorney General of the State of New York
Attorney for Respondent
W. Denis Donovan
120 Broadway, 25th Floor
New York, NY 10271
212-416-8020

Certilman Balin Adler & Hyman, LLP
Attorneys for Respondent
The Community Preservation Corporation
90 Merrick Avenue, 9th Floor
East Meadow, NY 11554
516-296-7000

APPENDIX

Appendix A - New York Court of Appeals Denial of Motion for Leave to Appeal (two causes) (January 17, 2006)

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the. seventeenth day of January, 2006

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

2-10 Mo. No. 1246

Florin C. Papa, also known as Florin C. Popescu,
Plaintiff,

v.

24 Caryl Avenue Realty Co. et al.,
Defendants;

Community Preservation Corporation,
Intervenor;

Charles Rudd MacKenzie,
Nonparty Appellant;

W. Denis Donovan, &c.,
Nonparty Respondent.

Community Preservation Corporation,
Third-Party Respondent,

v.

Charles Rudd Mackenzie, &c.,
Third-Party Appellant.

A motion for leave to appeal to the Court of Appeals in the above causes having heretofore been made upon the part of the

nonparty appellant and third-party appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Stuart M. Cohen
Clerk of the Court

Appendix B - Decision and Order of the State of New York, Appellate Division, Second Judicial Department (November 7, 2005)

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D8771
E/cf

__AD3d__ Argued - October 3, 2005

BARRY A. COZIER, J.P.
DAVID S. RITTER
ROBERT A. SPOLZINO
ROBERT J. LUNN, JJ.

2004-10735

DECISION & ORDER

Florin C. Papa, a/k/a Florin C. Popescu, plaintiff, v 24 Caryl Avenue Realty Co., et al., defendants; Community Preservation Corporation, intervenor-third-party plaintiff-respondent; Charles Rudd Mackenzie, etc., third-party defendant-appellant.

(Index No: 9221/00)

Charles Rudd Mackenzie, Yorkers, N.Y., third-party defendant-appellant pro se.

Certilman Balin Adler & Hyman, LLP, East Meadow, N.Y. (Patrick McCormick and Stacey Ramis Nigro of counsel), for intervenor third-party plaintiff-respondent.

In an action to foreclose a mortgage, the third-party defendant appeals from a judgment of the Supreme Court, Westchester County (Donovan, J.), entered April 1, 2004, which is in favor of the third-party plaintiff and against him in the total sum of $419,075.46 and dismissed his counterclaims.

ORDERED that the judgment is affirmed, with costs.

The Supreme Court correctly granted the motion of Community Preservation Corporation (hereinafter CPC) for summary judgment dismissing the third-party counterclaims of Charles Rudd Mackenzie and for summary judgment on CPC's third-party claim for damages pursuant to Judiciary Law § 487(1) on the basis of attorney misconduct. The documentary evidence in support of CPC's motion established that Mackenzie, the plaintiff's attorney, commenced the action to foreclose a mortgage following two judicial determinations that the mortgage had been satisfied and the debt extinguished. Moreover, Mackenzie failed to name CPC as a defendant in the action, even though he knew from previous litigation that CPC was a mortgagee with an unsatisfied claim. After commencing the foreclosure action, Mackenzie made a motion for leave to enter judgment upon the defendants' failure to appear or answer and to direct the Commissioner of Finance of the County of Westchester (hereinafter the Commissioner of Finance) to disburse the surplus funds that were being held as a result of a prior foreclosure action. In making his motion, Mackenzie failed to disclose to the court that the plaintiff's motion for leave to intervene in the prior foreclosure proceeding had been denied, that CPC had a claim to the surplus funds, and that the plaintiff's other foreclosure action had been dismissed. After the motion, inter alia, for a default judgment was granted, MacKenzie obtained the funds from the Commissioner of Finance, disbursed a portion to the plaintiff, and retained the balance, the sum of approximately $80,000, as his fee. When CPC moved for leave to intervene in the foreclosure action and the court

learned what had happened, the court directed Mackenzie to deposit the sum of approximately $80,000 with the Commissioner of Finance. Mackenzie failed to do so, claiming financial inability. As a result, CPC was deprived of the benefit of the surplus funds to which it was entitled. CPC thus established, prima facie, its entitlement to judgment as a matter of law pursuant to Judiciary Law § 487(1) *(see Schindler v Issler & Schrage, P.C.*, 262 AD2d 226; *cf. Knecht v Tusa*, 15 AD3d 626; *O'Connell v Kerson*, 291 AD2d 386). Since Mackenzie failed to raise a triable issue of fact in response, summary judgment in favor of CPC was properly granted *(see New York City Tr. Auth. v Morris J. Eisen, P.C.*, 276 AD2d 78; *Burton v Kaplan*, 184 AD2d 408).

Contrary to Mackenzie's contentions, the judgment against him in this civil action does not constitute a criminal conviction requiring proof beyond a reasonable doubt at trial *(see* CPL 1.20[13]; *Snow v Shreffler*, 148 App Div 422; *cf. People v Canale*, 240 AD2d 839).

Mackenzie's remaining contentions are without merit.

COZIER, J.P., RITTER, SPOLZINO and LUNN, JJ., concur.

ENTER:

s/ James Edward Pelzer
James Edward Pelzer
Clerk of the Court

Appendix C - Decision and Order of the Supreme Court of the State of New York, County of Westchester (February 13, 2004)

FILED & ENTERED
on 2/13/04
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: W. DENIS DONOVAN. J.S.C.

To commence the statutory time period, for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

_____X

FLORIN C. PAPA a/k/a FLORIN C. POPESCU,

DECISION & ORDER

Plaintiff,

Index No. 9221/00
Motion Date: 1215/03

-against-

24 CARYL AVENUE REALTY CO., ESAT ASTAFOVIC, and MIKHAIL KOFMAN,

Defendants,

-and-

THE COMMUNITY PRESERVATION CORPORATION,

Intervenor.

_____X

_____X

THE COMMUNITY PRESERVATION CORPORATION,

Third-Party Plaintiff,

-against- Index No. 9221/00T

CHARLES RUDD MACKENZIE, ESQ.,

Third-Party Defendant.

_____X

DONOVAN, J:

The following papers were read on motions by defendants 24 Caryl Avenue Realty Co., Esat Astafovic, and Mikhail Kofman to vacate their default in answering the complaint and to extend their time to serve an answer; plaintiff's cross-motion for leave to serve an amended complaint; CPC's cross-motion for summary judgment dismissing the original complaint; and CPC's motion for summary judgment on its third party complaint and dismissal of the counterclaims asserted in the third-party answer.

	PAPERS NUMBERED
Order to Show Cause/Affirmation/ Affidavit/Exhibits (A-D)	1
Notice of Motion/Affirmation/ Affidavit/Exhibits(1-2)	2
Notice of Cross-Motion/Affirmation/ Exhibits(A-G)	3
Notice of Cross-Motion/Affidavit/ Exhibits(A-EE}	4
Memorandum	4A

Plaintiffs Reply/Opposition/ Affirmation/Exhibits(A-D)	5
Memorandum	5A
Reply & Opposing Affirmation/ Exhibits(A-D)	6
Reply Affirmation/Exhibits(A-D)	7
Notice of Motion/Affirmation/ Exhibits(A-Y)	8
Memorandum	8A
Affidavit in Opposition	9
Reply Affirmation	10

Upon the foregoing papers, the motions and cross-motions are determined as follows:

BACKGROUND

This is the third, and significantly, the latest, of three actions involving mortgages on property located at 24 Caryl Avenue in Yonkers.

In the earliest action, filed in August, 1998, the Federal National Mortgage Association ("Fannie Mae") sought foreclosure against all parties interested in the property [*Federal National Mortgage Association v 24 Caryl Avenue Realty Co.*, et al, Index No. 12578/98]. Plaintiff herein, Florin Papa, who alleges that he held a mortgage on the property, was not named as a defendant by Fannie Mae for reasons that will become clear in discussing the second action. Approximately one year after the lawsuit was filed, Florin Papa moved to intervene, but his motion was denied by Hon. Orazio Bellantoni, to whom that action had been assigned. Justice Bellantoni's decision stated as follows;

> [T]he motion is denied, the movant having submitted no evidence in admissible form establishing that he.. has

> any interest in the property being foreclosed, or that he is a necessary party. The Court notes that the only papers submitted by movant were an unsigned "attorney affirmation," a photocopy of a purported "affidavit of merit" from another action, and a "verified answer which was neither signed nor verified.

The second action was filed by Florin Papa on October 13, 1998 [*Papa v Papa, et al.* Index No. 16220/98]. In this second action ("the fraud action"), plaintiff alleged that his ex-wife fraudulently satisfied a $245,000.00 mortgage both held on the 24 Caryl Avenue property. He sought to foreclose on the mortgage as well as to obtain a money judgment for one-half of the proceeds received by his ex-wife in satisfaction of the mortgage. In June, 2000, plaintiff moved to extend his time to serve the summons and complaint on defendant Esat Astafovic, one of the principals of 24 Caryl Avenue Realty Co. Fannie Mae, a defendant in the action, cross-moved to dismiss the foreclosure cause of action. In a decision dated July 20, 2000, Hon. Louis Barone, to whom that action was assigned, denied plaintiffs motion. More to the point, Justice Barone granted Fannie Mae's cross-motion as follows:

> As to the mortgage Plaintiff seeks to foreclose, said mortgage was satisfied.
>
> By way of background, 24 Caryl Avenue Realty had given a mortgage to the Papas for $245,000.00 in 1986. The Papas became involved in a marital dispute. It is alleged before equitable distribution was completed, Safa Papa, without plaintiffs knowledge, executed a satisfaction to Caryl Realty for the mortgage and recorded same with the Westchester County Clerk's Office on August 30, 1995. Safa Papa received $160,000.00 for the satisfaction. Plaintiff does not seek

to vacate the satisfaction, but addresses a cause of action for her failure to share the proceeds with him.

Fannie Mae commenced a proceeding on August 20, 1998 to foreclose the first mortgage it holds on 24 Caryl Avenue. Florin Papa moved by Order to Show Cause to be named as a "necessary party" in said foreclosure. Both the action and motion were before the Hon. Orazio R. Bellantoni. Justice Bellantoni issued an order on April 3, 2000 denying Florin Papa's motion to intervene and be considered a necessary party. In accordance with this holding Papa's First Cause of Action is barred by the doctrine of collateral estoppel.

***

The cross-motion of Defendant Fannie Mae dismissing Plaintiff's First Cause of Action is granted. The mortgage Plaintiff seeks to foreclose has been satisfied.

The third action - the one before this court - was filed on June 16, 2000, i.e., after plaintiff was denied leave to intervene in the Fannie Mae action by Justice Bellantoni and on the exact same day that plaintiff's motion and Fannie Mae's cross-motion were submitted to Justice Barone in the second action. This third action, which named only 24 Caryl Avenue Realty Co. and its principals as defendants, sought to foreclose the $245,000.00 mortgage given to plaintiff and his ex-wife in 1986. The complaint made only one carefully worded reference to the fraud action in Paragraph 23:

No other civil action at law or in equity is pending for recovery of the monies or any part thereof secured by said Note and Mortgage, except that Index. No. 98-16220, filed on or about October 13, 1998 in this Court, is pending but defendants herein were not served

or not properly served with process in said action, and said action has been partially discontinued.

This action remained dormant until June 27, 2001, when plaintiffs counsel, CharlesRudd Mackenzie, Esq., filed an RJI in connection with a motion for an order entering judgment on default and directing that surplus funds on deposit with the Westchester County Commissioner of Finance be turned over to plaintiff in satisfaction of the unpaid amount of the mortgage.[1] In completing the RJI, Mr. Mackenzie did not include either of the prior two actions in the section of the RJI seeking information on "RELATED CASES."

This court granted plaintiffs motion, which was unopposed, on August 1, 2001, but, in an exercise of caution, appointed a referee "who, in addition to making an independent and up to date calculation of the amount due on the mortgage, shall be directed to inquire into and report on plaintiffs entitlement to the funds on deposit." The referee filed a report, which calculated the amount due to plaintiff, as of October 16, 2001, as $229,080.98, with interest accumulating at the rate of $20.96 per day. The report stated, as to plaintiff's entitlement to the funds, that based on counsel's statement that all necessary parties were notified of the action or had their interests satisfied, "it appears that plaintiff is entitled to the [funds]."

On October 26, 2001, this court signed an order directing the Commissioner of Finance to turn over the sum of $229,290.58, plus accrued interest less statutory fees, to plaintiff.

---

[1] The surplus funds resulted from the foreclosure sale directed by Justice Bellantoni in the judgment of foreclosure entered in the Fannie Mae action on July 31, 2000. The sale proceeds satisfied Fannie Mae's mortgage of approximately $901,114.61, and the surplus of $259,985.71 was deposited with the Westchester County Commissioner of Finance on January 17, 2001.

On September 17, 2002, Justice Ballantoni issued an order directing that the Westchester County Commissioner of Finance pay out of the surplus money on deposit the sum of $122,698.13 to The Community Preservation Corporation ("CPC"), the second-named defendant in the Fannie Mae action. By that point, however, there were insufficient funds on deposit . to make this payment to CPC since plaintiff already had removed approximately $230,000.00 as per this court's order of October 26, 2001.

In November, 2002, plaintiff's fraud action against his ex-wife was assigned to this court for trial. Pared down, the dispute at that point centered on $60,000.00 held in the escrow account of the attorney for plaintiff's ex-wife. On November 20, 2002, the action was settled on the record and in open court. Pursuant to the settlement, the entire $60,000.00 was turned over to plaintiff's ex-wife in return for full satisfaction of any past child support arrears and a $6,000.00 credit toward future child support payments.

The story does not end here.

On April 28, 2003, this court granted CPC's motion to intervene in this action and, *inter alia,* vacated the default that resulted in the October 26, 2001 turn-over order and directed plaintiff to return the funds to the Westchester County Commissioner of Finance within five days. Not surprisingly, the money never appeared.

By letter dated June 12, 2003, this court directed counsel to appear in court on June 19, 2003. On that date, Charles Rudd Mackenzie, Esq., appearing for plaintiff, confirmed that restitution had not been made as directed in the April 28, 2003 order. During the course of the court's inquiry, Mr. Mackenzie admitted that he received a fee of approximately $80,000.00 out of the funds removed from the Westchester County

Commissioner of Finance. The court then directed Mr. Mackenzie to produce all billing records, etc., connected with *his representation of Mr. Papa and to deposit the entire fee and* all disbursements received by him from the surplus funds with the Commissioner of Finance by June 23, 2003.

On June 23, 2003, Mr. Mackenzie failed to produce or deposit the legal fees and disbursements received by him out of the surplus funds. The court then gave him written notification that he was charged with

> wilful disobedience to a lawful mandate of the court,
>
> namely, your wilful failure to produce in court the entire amount of your fee received out of the funds withdrawn from the County Treasury in the above captioned action, as order [sic] by this court on June 19, 2003.

The court then allowed Mr. Mackenzie until July 10, 2003, to purge himself of this contempt. On July 8, Mr. Mackenzie presented four checks to the Commissioner of Finance totaling $27,481.08. At the same time, he filed an affidavit explaining his financial inability to deposit the remainder of the funds. On July 10, in open court, the court and counsel questioned Mr. Mackenzie extensively about his alleged inability to deposit the entire amount of the funds. *Inter alia*, Mr. Mackenzie disclosed that his client was in jail and that plaintiff's mother, who his office records showed received approximately $140,000.00 of the surplus funds, was in Romania. Mr. Mackenzie offered to produce plaintiff's mother on July 28 to allow the court "to inquire as to the balance of the funds that were paid to her." The court found the answers to be inadequate, found that Mr. Mackenzie willfully disobeyed a lawful mandate of the court, and willfully offered resistance to a lawful mandate of the court. It held Mr. Mackenzie in contempt, sentenced him to be

committed to the custody of the Sheriff of Westchester County, but stayed the commitment until July 14 to allow Mr. Mackenzie time to appeal.

The Appellate Division issued a stay. This court then directed Mr. Mackenzie and plaintiff's parents to appear on July 28, 2003, as Mr. Mackenzie had offered on July 10. Mr. Mackenzie appeared, but plaintiff's parents did not. The court then instructed Mr. Mackenzie to obtain certain information from plaintiff's parents and to report this information to the court on August 1. On July 29, 2003, the Appellate Division lifted its stay of the order of commitment issued by this court on July 10. On August 1, Mr. Mackenzie appeared in court as previously directed, and the court ordered his commitment. Mr. Mackenzie remained in the county jail until he was released on August 29, 2003.

THE PRESENT APPLICATIONS

The court now has before it several applications:

1) By order to show cause dated August 11, 2003, and a notice of motion dated October 31, 2003, defendants 24 Caryl Avenue Realty Co., Esat Astafovic, and Mlkhail Kofman move to vacate their default in answering the complaint and to extend their time to serve an answer.

2) By cross-motion dated September 9, 2003, plaintiff moves for leave to serve an amended complaint, adding his ex- wife as a defendant and alleging fraud against all defendants in the satisfaction of the mortgage.

3) By cross-motion dated October 9, 2003, CPC opposes the cross-motion to amend the complaint and seeks summary judgment dismissing the original complaint.

4) By motion dated November 11, 2003, CPC seeks summary judgment on its third party complaint and dismissal of the counterclaims asserted in the third-party answer.

PLAINTIFF'S CROSS-MOTION FOR LEAVE TO AMEND

Plaintiff's cross-motion for leave to amend his complaint is a cynical attempt to re-litigate issues that have been determined by two Supreme Court Justices in the two prior actions. Although leave to amend a pleading should be freely given, it is well-settled that in determining a motion for leave to amend the court must pass upon the validity of the proposed amendment [*East Asiatic Company v Corash*, 34 AD2d 432 (1st Dept. 1970)]. Where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave should be denied [*Del Bourgo v 138 Sidelines Corp.*, 208 AD2d 795, 796 (2d Dept. 1994)]. Such is the case here.

First, plaintiff, via his attorney, alleges in the proposed pleading as follows:

> The defendants and the ex-wife knowingly defrauded the plaintiff of his interest in money owed to the plaintiff under the subject mortgage and note by entering into the said "agreement" and having the aforesaid fraudulent satisfaction certificate signed and recorded in the public records of the Westchester County Attorney's Office, thereby misrepresenting to third parties and the general public at large that the subject mortgage, and the plaintiff as mortgagee, is paid, ever though said mortgage and plaintiff have in truth not been paid. [Proposed Amended Complaint ¶ 23]

These allegations - which are the factual underpinnings of two of the three causes of action asserted in the proposed

amended complaint - ignore both the controlling law and the evident facts of the case. In law, a joint mortgagee, such as plaintiff's ex-wife, is legally entitled to discharge a mortgage in the absence of the other joint mortgagee [Real Property Law § 321(1)(c). In fact, the mortgage was satisfied in 1995, and the discharged signed by plaintiff's ex-wife on August 24, 1995. Plaintiff, despite any protests to the contrary, received a benefit from this satisfaction when, after suing his ex-wife for fraud in the second action, settled that action by relinquishing his claim to the $60,000.00 in disputed proceeds in return for a credit to past and future child support payments, a settlement that was reached on the record in front of this very court.

In addition, that settlement was reached after two Justices of the Supreme Court - Justice Bellantoni, in his denial of plaintiff's motion to intervene in the Fannie Mae action, and Justice Barone, in his granting of Fannie Mac's cross-motion to dismiss the foreclosure cause of action in the fraud action - each found that the mortgage had been satisfied.[2]

Second, even if the doctrines of *res judicata* and collateral estoppel did not operate to negate the merits of the proposed amendment, plaintiff does not adequately support his amendment by submitting his own affidavit. Counsel's affirmation, which offers no excuse for the lengthy delay and is not from someone with personal knowledge of the facts, is insufficient to support the application for leave to amend [*Bonanni v Straight Arrow Publishers, Inc.*, 133 AD2d 585 (1st Dept. 1987)].

---

[2] Plaintiff argues that the decision by Justice Barone is a nullity because the foreclosure cause of action had been voluntarily discontinued prior to the decision. Regardless of the decision, plaintiff's ex-wife had the legal authority to discharge the mortgage in 1995. The mortgage had been satisfied.

CPC'S CROSS-MOTION FOR SUMMARY JUDGMENT

CPC cross-moves for summary judgment dismissing the complaint and for an order directing the release of the surplus funds on deposit with the Westchester County Commissioner of finance.

It is patently clear from the record presented that the mortgage satisfaction signed by plaintiff's ex-wife was legal and proper, that plaintiff from that point on had no interest in the property, and that plaintiff received a benefit from the satisfaction of the mortgage when he settled the fraud action in open court on November 20, 2002. The court cannot express the truth simply enough: there is no mortgage for plaintiff to foreclose.

The court, therefore, grants CPC summary judgment dismissing the complaint. Based on the September 18, 2002 order of Justice Bellantoni, which awarded CPC the sum of $122,698.13, plus interest, CPC is granted partial summary judgment on its counterclaims and is entitled to the funds on deposit.[3]

CPC is directed to settle an order directing the release of the funds.

DEFENDANTS' MOTIONS TO VACATE THEIR DEFAULT

Defendants move to vacate their defaults in answering the complaint and for leave to serve an answer. Although the complaint is dismissed, leave to serve an answer would not be

---

[3] It appears that approximately $51,000.00 is on deposit at the present time.

an exercise in futility because counterclaims asserted in the proposed answer seek to recover a portion of what would have been the surplus funds had these surplus funds not been removed from the County Treasury.

In support of their motions, defendants contend they never received the summons and complaint. Their proposed defense is obvious, namely, that they received a satisfaction of the mortgage plaintiff seeks to foreclose approximately five years before plaintiff filed this action.

Defendants moving to open defaults under CPLR 5015(a)(1) and CPLR § 317 must demonstrate both a reasonable excuse for the default and meritorious defense [*see Barasch v Micucci*, 49 NY 2d 594 (1980)]. Defendants moving under CPLR 501.5 (a)(4) need only show that they were not served with process; this failure to obtain jurisdiction voids any judgment *ab initio*.

The record in this case demonstrates that the defaulting defendants have a meritorious defense to the claims plaintiff asserted in the original complaint. Defendants have not, however, demonstrated a reasonable excuse for their default or a failure of jurisdiction. They submit only a single affidavit to challenge service of process, and even this affidavit contains hearsay statements regarding the possibility that the process server served defendant Astafovic's brother rather than defendant himself.

Although the court syrnpathizes with these defendants, it must deny the motions. Defendants, if so advised, may pursue their remedies in a separate action.

CPO'S MOTION FOR SUMMARY JUDGMENT ON THE THIRD-PARTY COMPLAINT

On June 17, 2003, CPC filed a third-party complaint against Charles Rudd Mackenzie, Esq., alleging that, in litigating the Fannie Mae action, the fraud action, and this action, Mr. Mackenzie intentionally deceived and misinformed the court and ultimately obtained access to the surplus funds based upon this deception and misinformation. CPC seeks treble damages, as are allowed under Judiciary Law § 487.

Mr. Mackenzie counterclaims for damages, alleging that CPC's own alleged misrepresentations led to his unlawful incarceration during the month of August.

Under Judiciary Law § 487, an attorney who is guilty of any deceit or collusion, or consents to any deceit or collusion with the intent to deceive the court or any party, is liable for treble damages to be recovered in a civil action.

Under the statute, CPC must prove four elements: 1) Mr. Mackenzie is an attorney; 2) Mr. Mackenzie is guilty of deceit; 3) Mr. Mackenzie acted with intent to deceive the court; and 4) Mr. Mackenzie's conduct injured a party.

It is beyond question that the first and fourth of these elements have been proven. Mr. Mackenzie is an attorney, and CPC, which has not and may never obtain the full amount of, surplus funds awarded by Justice Bellantoni, has been injured by Mr. Mackenzie's conduct. The question is whether Mr. Mackenzie is guilty of the second and third elements, deceit and intent to deceive.

In the context of Judiciary Law § 487, deceit may be inferred from "a chronic, extreme pattern of legal delinquency"

[*Donaldson v Bottar*, 275 AD2d 897, 898 (4th Dept. 2000)]. Such a pattern is evident here.

In its prior decision and order, which *inter alia*, granted CPC's motion to intervene and directed plaintiff to return the surplus funds to the Commissioner of Finance, the court made the following findings:

> Surely, both plaintiff and his attorney, Charles Rudd Mackenzie, Esq., had actual knowledge that CPC held a valid mortgage encumbering the subject property yet, inexplicably, CPC was not named as a defendant in this action. As the holder of a duly recorded mortgage, CPC, as a matter of law, was and is a necessary party to this foreclosure action. CPC is clearly thereby entitled to an order granting its motion to intervene in this action.
>
> Additionally, because the Papa Mortgage was satisfied before plaintiff commenced this action, pursuant to CPLR 5015(a)(1) and (3), CPC argues that it is entitled to an order vacating the default judgment and, under CPLR 5015(d), CPC is entitled to an order directing plaintiff to make restitution by returning the ill-gotten surplus monies to the Westchester County Commissioner of Finance.
>
> Papa commenced this foreclosure action despite knowing that the Papa Mortgage, which he was seeking to foreclose, had been satisfied of record.
>
> As evidenced in plaintiff's papers submitted to this court, neither plaintiff nor his attorney advised this Court that the Papa Mortgage had been satisfied. Additionally, neither the plaintiff nor his attorney Charles Rudd Mackenzie, Esq. informed this Court that

> CPC held a valid mortgage and claimed a right to surplus monies that Papa ultimately illegally obtained.
>
> Plaintiff and plaintiff's counsel never informed this Court of two related actions, pending before Hon. Louis Barone and Hon. Orazio Bellantoni and never informed this Court that those justices' decisions were contrary from what plaintiff and plaintiff's counsel represented to this Court.
>
> Representations by plaintiff and his attorney that no other person had any interest in the monies or deposit with the County Treasury, were total falsehoods aimed at misinforming this Court of the true facts. Had this Court been informed of any of these disingenuous fabrications, this Court would never have released the funds on deposit with the County Treasury - clearly those funds, under the within circumstances, could never be lawfully released to plaintiff or plaintiff's counsel.
>
> This Court finds that plaintiff and plaintiff's counsel do not come into this proceeding with clean hands.

The court made these findings in May, 2003, before the succession of court appearances and hearings that fleshed out the record to a more elaborate degree and that resulted in Mr. Mackenzie's incarceration for contempt. The comprehensive record adduced on these motions and cross-motions only adds to what the court finds is a chronic and extreme pattern of legal delinquency on the part of Mr. Mackenzie.

For example, in April, 2001 - two months before plaintiff filed the RJI in this action in conjunction with his motion for a default and for a release of the surplus funds - Mr. Mackenzie was actively trying to negotiate a consolidation of this action with the Fannie Mae action as well as a compromise on the

surplus funds. Under cover letter of April 13, 2001, Mr. Mackenzie sent a proposed stipulation to counsel for Fannie Mae and counsel for CPC. Needless to say, the stipulation never was executed. And yet, two months later, when he filed his RJI, Mr. Mackenzie made no mention of the Fannie Mae action as a related case - this despite his obvious belief that the two actions were closely related enough *to be consolidated* - and provided no notice of the application to CPC, which clearly had a competing and superior claim to the same funds.

In the face of this smoking gun, Mr. Mackenzie claims ignorance. He did not know how to fill out an RJI. .When he feels ignorance is insufficient to relieve him from liability, he blames the court for not searching out the possible existence of related cases on its own, or clerks for accepting incomplete RJIs.

A perfect example is Mr. Mackenzie's argument that, despite his inability to fill out an RJI, he informed the court of the fraud action in ¶23 of the complaint in this action. That paragraph, quoted in full on page 4 of this decision, says nothing substantive, and, when read carefully and in context, actually leads one to believe that the court lacked jurisdiction over any of the defendants and/or that the foreclosure cause of action had been discontinued. In fact, on June 16, 2000, the day Mr. Mackenzie signed the complaint in this action, none of this was true. The foreclosure cause of action had not been discontinued (that did not occur until July 16, 2000) and Mr. Mackenzie, on behalf of his client, already had moved to extend the time to serve one of the several defendants. This litigation posture is directly at odds with the tenor of ¶23 and is another example of Mr. Mackenzie's pettifogging style of practice.

Ignorance is no defense, whether it be of the law or of the proper way to fill out an RJI. Nor may attempting to foist the blame on others relieve an attorney of liability when the record

clearly shows a pattern of legal delinquency [*Schindler v Issler & Schrage*, 262 AD2d 225 (1st Dept. 1999)]. Mr. Mackenzie's defenses are as tissue-thin as his arguments in favor of plaintiff's claims. They are more wishful thinking and *ipse dixit* than they are factually relevant and legally sound.

On this record the court finds Charles Hudd Mackenzie, Esq. guilty of deceit within the meaning of Judiciary Law § 487 and grants CPC summary judgment on its third party complaint.

In his counterclaims, Mr. Mackenzie seeks damages from CPC for false imprisonment, battery, and intentional infliction of emotional distress. None of these counterclaims states a cause of action.

A claim for false imprisonment requires a plaintiff to plead and prove: 1) that defendant intended to and did confine plaintiff; 2) that plairtiff was aware of the confinement; 3) that plaintiff did not consent to the confinement; and 4) that the confinement was not otherwise privileged [*Lee v City of New York*, 272 AD2d 586 (2d Dept. 2000)]. None of the underlying factual allegations made by Mr. Mackenzie in his counterclaims establish these requisite elements. CPC neither intended to confine nor did confine Mr Mackenzie. Instead, he alleges that counsel for CPC "observed" the courtroom proceedings leading up to his incarceration, "urged" his imprisonment, and opposed his motion in the Appellate Division These allegations, whatever their doubtful relevance, would not, even if proven, establish the first element. Moreover, at this stage, there is no court decision holding that the incarceration was unlawful, The Appellate Division lifted the stay of the incarceration order after a fully briefed motion. No appeal has reversed this court's action.

The battery claim requires a plaintiff to plead and prove 1) bodily contact that was, 2) intentional, and 3) offensive

[*Zgraggen v Wilsey*, 200 AD2d 818 (3d Dept. 1994)]. Mr. Mackenzie does not allege any bodily contact between CPC (or its counsel) and himself.

The intentional infliction of emotional harm claim requires a plaintiff to plead and prove 1) extreme and outrageous conduct; 2) intent to cause, or disregard to the substantial probability to cause, severe emotional distress; 3) a causal connection between the conduct and the injury; and 4) severe emotional distress [*Howell v N. Y. Post Co.*, 81 NY2d 115 (1993)]. In this case, there is no way (except through wishful thinking) that any actions on the part of CPC or its counsel may be construed as extreme or outrageous. The mere presence of counsel at the contempt hearing and counsel's opposition to Mr. Mackenzie's motion for a stay in the Appellate Division are neither extreme nor outrageous.

Accordingly, the counterclaims are dismissed.

CPC is directed to settle an order granting the entry of judgment for treble damages and crediting any amounts recovered from the existing surplus funds against such judgment.

This constitutes the decision and order of the court.

ENTER:

_____

HON. W. DENIS DONOVAN
Justice Supreme Court

Dated: February 11th, 2004
White Plains, New York

To:

CERTILMAN BALIN ADLER & HYMAN
90 Merrick Avenue
East Meadow, New York 11554
Attorneys for Intervenor/Defendant

DANIEL HEYMAN, ESQ.
670 White Plains Road
Scarsdale, New York 10583
Attorney for Defendants

CHARLES RUDD MACKENZIE, ESQ.
135 Southside Avenue
Hastings-on-Hudson, New York 10706
Attorney for Plaintiff

Appendix D - New York Court of Appeals Denial of Motion for Reargument (June 16, 2005)

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of June 2005

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 396

Florin C. Papa, a/k/a Florin C. Popescu,
Plaintiff,

v

24 Caryl Avenue Realty Co. et al.,
Defendants;

Community Preservation Corporation,
Intervenor;

Charles Rudd MacKenzie,
Nonparty Appellant;

W. Denis Donovan, &c.,
Nonparty Respondent.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the nonparty appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

Appendix E - New York Court of Appeals Dismissal of Motion for Leave to Appeal (March 31, 2005)

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirty-first day of March 2005

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

2-10 Mo. No. 164

Florin C. Papa, a/k/a Florin C. Popescu,
Plaintiff,

v.

24 Caryl Avenue Realty Co. et al.,
Defendants;

Community Preservation Corporation,
Intervenor;

Charles Rudd MacKenzie,
Nonparty Appellant;

W. Denis Donovan, &c.,
Nonparty Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the nonparty appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed

from does not finally determine the action within the meaning of the Constitution.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

Appendix F - Decision and Order of Supreme Court of the State of New York, Appellate Division, Second Judicial Department (January 24, 2005)

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D5364
R/hu

__AD3d__ Argued - December 10, 2004

ROBERT W. SCHMIDT, J.P.
THOMAS A. ADAMS
BARRY A. COZIER
SONDRA MILLER, JJ.

2003-09151 DECISION & ORDER

Florin C. Papa, a/k/a Florin C. Popescu, plaintiff, v 24 Caryl Avenue Realty Co., et al., defendants; Community Preservation Corporation, intervenor; Charles Rudd Mackenzie, nonparty appellant; W. Denis Donovan, etc., respondent.

(Index No. 9221/00)

Bosworth, Gray & Fuller, Bronxville, N.Y. (David Otis Fuller, Jr., of counsel), for nonparty-appellant.

Eliot Spitzer, Attorney-General, New York, N.Y. (Michael S. Belohlavek and Oren L. Zeve of counsel; Sylvia Park on the brief), for respondent.

In an action to foreclose a mortgage, the plaintiff's attorney, Charles Rudd MacKenzie, appeals, by permission, from an order of the Supreme Court, Westchester County (Donovan, J.), dated August 1, 2003, which, after a hearing, held him in criminal contempt of court for his willful violation of an order of the same court dated June 19, 2003, imposed upon him a term of imprisonment of 30 days with the ability to purge upon the deposit of the balance of certain fees and disbursements he received in the sum of $52,073.34 with the Westchester County Treasurer, and imposed a fine in the sum of $250.

ORDERED that the order is affirmed, without costs or disbursements.

The evidence before the Supreme Court was sufficient to find that the appellant willfully disobeyed a lawful mandate of the court, which constituted criminal contempt *(see* Judiciary Law § 750[A][3]; *City of Poughkeepsie v Hetey*, 121 AD2d 496). There was evidence presented at the hearing to support the conclusion that, contrary to the appellant's contention, his failure to comply with the underlying order was willful *(see Ferraro v Ferraro*, 272 AD2d 510; *Matter of Gerzack v Gerzack*, 87 AD2d 612; *cf. Matter of Riccio v Paquette*, 284 AD2d 335; *Matter of Solerwitz v Signorelli*, 183 AD2d 718).

The appellant's remaining contentions are without merit.

SCHNEDT, J.P., ADAMS, COZIER and S. MILLER, JJ., concur.

ENTER:

s/ James Edward Pelzer
James Edward Pelzer
Clerk of the Court

Exhibit G - Order of the Supreme Court of the State of New York, County of Westchester (dated August 1, 2003 and entered August 7, 2003)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED
Aug 7 - 2003
Leonard N. Spano
County Clerk
County of Westchester

P R E S E N T: HON. W. DENIS DONOVAN, *J.S.C.*

----------x

FLORIN C. PAPA a/k/a FLORIN C. POPESCU,

Plaintiff,

-against-

Index No .:
00-09221
ORDER

24 CARYL AVENUE REALTY CO., EAST ASTAFOVIC, and MIKHAIL KOFMAN,

Defendants,

- and -

THE COMMUNITY PRESERVATION CORPORATION,

Intervenor.

----------x

By Order dated April 28, 2003 this Court granted The Community Preservation Corporation's motion to intervene in this action pursuant to CPLR 1012 and 1013, vacated the default judgement previously entered in this action, granted a preliminary injunction enjoining plaintiff from disbursing,

dissipating, spending, secreting or otherwise transferring or hypothecating certain surplus monies and directed and ordered that plaintiff, within five days of the Order, under penalty of contempt, make restitution under CPLR 5015(d) by redepositing with the Westchester County Treasurer all funds obtained by plaintiff pursuant to this Court's August 1, 2001 Order (the "surplus") and to file proof of such deposit with this Court.

This Court did not receive proof of the ordered deposit and, by letter dated June 12, 2003, directed that all parties appear on June 19, 2003.

On June 19, 2003, in open court, on the record, Charles Rudd Mackenzie, Esq., attorney for plaintiff, confirmed that restitution, as ordered by this Court in its order dated April 28, 2003, had not been made. Charles Rudd Mackenzie, Esq. further informed this court that he was paid approximately $80,000 out of the funds removed from the Westchester County Treasurer.

On June 19, 2003, in open court, on the record, this court ordered that Charles Rudd Mackenzie, Esq. deliver to the Court all documentation relating to his attorneys fees in connection with this action and that Charles Rudd Mackenzie, Esq. deposit the fees and disbursements received by him from the Surplus with the Westchester County Treasurer on or before June 23, 2003.

On June 23, 2003, in open court, on the record, Charles Rudd Mackenzie, Esq. failed to produce or deposit the legal fees and disbursements received by him from the Surplus and was served, by this Court, with written notification of his charges, pursuant to Judiciary Law §751 and the Rules of the Appellate Division, Second Department, of willful disobedience of a lawful mandate of this court, namely, his failure: to produce in court the entire amount of his fee received out of the funds

withdrawn from the Westchester County Treasurer in this action in violation of this Court's June 19, 2003 Order.

On July 8, 2003, Charles Rudd Mackenzie, Esq., presented four checks to the Commissioner of Finance. The checks totaled $27,451.08. At the same time, Charles Rudd Mackenzie, Esq., filed with this Court an affidavit explaining his financial inability to deposit the remainder of the monies received by him from the surplus.

On July 10, 2003, in open court, this court and counsel for the intervenor, The Community Preservation Corporation, questioned Charles Rudd Mackenzie, Esq., on his alleged financial inability to deposit the entire amount of the funds, as ordered on June 23, 2003. This Court found the answers provided by Charles Rudd Mackenzie, Esq., to be an insufficient and inadequate explanation for his failure to obey the lawful order of this court.

Based on the foregoing, the Court further found that Charles Rudd Mackenzie, Esq., wilfully disobeyed a lawful mandate of this Court and wilfully offered resistance to a lawful mandate of this Court. The Court held Charles Rudd Mackenzie, Esq., in contempt, but stayed his commitment to the custody of the Sheriff of Westchester County until July 14, 2003. An Appellate Division stay obtained by Mr. Mackenzie has been lifted by order dated July 29, 2003.

NOW, based on the foregoing, it is

ORDERED that Charles Rudd Mackenzie, Esq., by reason of these acts, is guilty of contempt of the authority of the Court and, that for contempt of Court, Charles Rudd Mackenzie, Esq. be committed to the custody of the Sheriff of the County of Westchester for a period of 30 days or until he shall have deposited the balance of the entire fee and disbursements

received by him in the amount of $52,073.34 with the Westchester County Treasurer or until further order of this Court, and it is further

ORDERED that Charles Rudd Mackenzie, Esq., with his office located at 135 Southside Avenue, Suite 100, Hastings-on-Hudson, New York 10706, and with his home located at 422 East 83rd Street, Apartment 1A, New York, New York 10028, shall pay a fine, costs and fees in the amount of $250.00 for his misconduct together with any fees imposed by the Sheriff, and it is further

ORDERED that a warrant of commitment shall issue immediately.

Dated: August , 2003
White Plains, New York

s/ Hon. W. Denis Donovan
HON W. DENIS DONOVAN
JUSTICE SUPREME COURT

s/ Hon. W. Denis Donovan
W. DENIS DONOVAN
JUSTICE OF THE SUPREME COURT

Appendix H - Warrant of Commitment of the Supreme Court of the State of New York, County of Westchester (dated August 1, 2003 and entered August 7, 2003)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

Index No.: 00-09221

FLORIN C. PAPA a/k/a FLORIN C. POPESCU,

Plaintiff,

-against-

WARRANT OF COMMITMENT

24 CARYL AVENUE REALTY CO., ESAT ASTAFOVIC, and MIKHAIL KOFMAN,

Defendants,

-and-

THE COMMUNITY PRESERVATION CORPORATION,

Intervenor.

----------X

FILED
AUG 7 - 2003
Leonard N. Spano
County of Westchester

TO THE SHERIFF OF THE COUNTY OP WESTCHESTER AND SHERIFF OR CITY MARSHALL OF ANY OTHER COUNTY IN THE STATE OF NEW YORK. GREETINGS:

WHEREAS, an order was duly made by the Honorable W. Denis Donovan, J.S.C., dated June 23, 2003 charging

CHARLES RUDD MACKENZIE, ESQ. with criminal contempt; and

WHEREAS, an order was duly made by the Honorable W. Denis Donovan, J.S.C. dated August 1, 2003 in the above-entitled matter, attached hereto, finding CHARLES RUDD MACKENZIE, ESQ., in criminal contempt and directing that he be committed to the common jail of the County of Westchester, on August 1, 2003, there to remain charged with contempt in that he had willfully failed. to produce in court the entire amount of his fee and disbursements received out of funds improperly withdrawn from the Westchester County Treasury in the above-captioned action pursuant to an Order of this Court dated June 19, 2003, until he shall have deposited the sum of $ 52,073.34 with the Westchester County Treasurer as ordered by the aforesaid Order and until he shall have paid the fine, costs and fees imposed upon him by the aforesaid Order in the sum of $250.00 and paid any Sheriff's fees hereupon and that a Warrant of Commitment issue accordingly.

NOW, THEREFORE, WE COMMAND YOU, that you take the body of said CHARLES RUDD MACKENZIE, ESQ., and keep him safely and closely in your custody in the common jail of the County of Westchester for a period of 30 days or until he shall have deposited the sum of $52,073.34 with the Westchester County Treasurer and until he shall have fully paid the fine, costs and disbursements aforesaid, to wit: the sum of $250.00 and the fees, if an imposed by the Westchester County Sheriff and shall only be discharged by further order of this Court, and you make return of this writ and CHARLES RUDD MCKENZIE, ESQ., with your proceedings thereon to this Court.

WITNESS, Hon. W. Denis Donovan, one of the Justices of the Supreme Court at White Plains, New York this 15 day of August, 2003.

s/ Hon. W. Denis Donovan
HON. W. DENIS DONOVAN
J.S.C.

s/ Hon. W. Denis Donovan
W. DENIS DONOVAN
JUSTICE OF THE SUPREME COURT

Appendix I - Decision and Order of the Supreme Court of the State of New York, County of Westchester (dated April 28, 2003 and entered May 1, 2003)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: W. DENIS DONOVAN, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

----------X

FLORIN C. PAPA a/k/a FLORIN C. POPESCU,

Plaintiff,

DECISION AND ORDER

- against -

INDEX NO. 00-09221

24 CARYL AVENUE REALTY CO., ESAT ASTAFOVIC, and MIKHAIL KOFMAN,

Motion Date: 3/28/03

Defendants.

----------X

This is a motion pursuant to Order to Show Cause, by the Community Preservation Corporation: (1) to permit the Community Preservation Corporation to intervene in this action pursuant to CPLR 1012 and 1013; (2) to vacate the judgment entered in this action pursuant to CPLR 5015(a)(3); (3) to order restitution pursuant to CPLR 5015(d); and (4) to grant a preliminary injunction against plaintiff enjoining plaintiff from disbursing, dissipating, spending, secreting or otherwise transferring or hypothecating surplus monies obtained by him

or from transferring, dissipating, distributing, secreting or hypothecating assets obtained with the surplus money together with such other and further relief as may be just and proper.

Additional relief in the form of injunction is applied for wherein said plaintiff Florin C. Papa a/k/a Florin C. Popescu, be ordered enjoined from spending, dissipating, transferring, distributing, secreting or hypothecating any portion of the surplus money obtained by him under the August 1, 2001 order of this court obtained through surreptitious means and from dissipating, selling, transferring, distributing, secreting or hypothecating any assets purchased or acquired with or by the surplus money.

Plaintiff cross-moves to stay this action and to consolidate it with *Papa v Papa* (Index No. 16220/98).

The following papers were considered in this Application:

	PAPERS NUMBERED
Intervenor OTSC/Affirmation/ Exhibits (A-HH)	1
Intervenor Memorandum of Law	2
Affidavit of Service	3
Notice of Cross Motion/Affirmation/ Exhibits (A-R)	4
Memorandum of Law of Defendants	5
Reply Affirmation to. Cross Motion	6
Reply Affirmation in Support of Cross Motion	7

Upon the foregoing, this matter is decided accordingly:

On or about August 24, 1995, defendant 24 Caryl Avenue Realty Co., as Mortgagor, executed, *inter alia*, a note in the

principal amount of $84,000 and a Community Preservation Corp. mortgage (the "CPC Mortgage") encumbering property known as 24 Caryl Avenue Realty Co., City of Yonkers, Westchester County, New York (the "Mortgaged Property"). CPC was the mortagee under the CPC Mortgage.

As set forth in the CPC Mortgage, the CPC Mortgage was subordinate only to certain consolidated first mortgage liens of Fannie Mae.

Plaintiff Florin C. Papa a/k/a Florin C. Popescu, ("Papa") commenced this action on or about June 15, 2000, seeking, among other things, to foreclose a June 2, 1986 mortgage given to him and Safa Papa, his then wife, securing a $245,000 loan to 24 Caryl Avenue Realty Co., (the "Papa Mortgage"). The property encumbered by the Papa Mortgage was 24 Caryl Avenue, Yonkers, Westchester, New York.

The Papa Mortgage was satisfied by written satisfaction dated August 24, 1995. Papa commenced this action despite having actual knowledge of such satisfaction.

At the time Papa commenced this action, CPC, as mortgagee, was the holder of a valid mortgage given by 24 Caryl Avenue Realty Co., to secure a principal indebtedness of $84,000 (the ""CPC Mortgage") encumbering the same property as the Papa Mortgage. The CPA Mortgage was dated August 24, 1995 and was recorded in this Westchester County Clerk's office on August 30, 1995, and was subordinate only to a certain consolidated First Mortgage held by Federal National Mortgage Corporation ("Fanny Mae").

Surely, both plaintiff and his attorney, Charles Rudd Mackenzie, Esq., had actual knowledge that CPC held a valid mortgage encumbering the subject property yet, inexplicably, CPC was not named as a defendant in this action. As the holder

of a duly recorded mortgage, CPC, as a matter of law, was and is a necessary party to this forclosure action. CPC is clearly thereby entitled to an order granting its motion to intervene in this action.

Additionally, because the Papa Mortgage was satisfied before plaintiff commenced this action, pursuant to CPLR 5015(a)(1) and (3), CPC argues that it is entitled to an order vacating the default judgment and, under CPLR 5015(d), CPC is entitled to an order directing plaintiff to make restitution by returning the ill-gotten surplus monies to the Westchester County Commissioner of Finance.

Papa commenced this foreclosure action despite knowing that the Papa Mortgage, which he was seeking to foreclose, had been satisfied of record.

As evidenced in plaintiff's papers submitted to this court, neither plaintiff nor his attorney advised this Court that the Papa Mortgage had been satisfied. Additionally, neither the plaintiff nor his attorney Charles Rudd Mackenzie, Esq. informed this Court that CPC held a valid mortgage and claimed a right to surplus monies that Papa ultimately illegally obtained.

Plaintiff and plaintiff's counsel never informed this Court of two related actions pending before Hon. Louis Barone and Hon. Orazio Bellantoni and never informed this Court that those justices' decisions were contrary from what plaintiff and plaintiff's counsel represented to this Court.

Representations by plaintiff and his attorney that no other person had any interest in the monies or deposit with the County Treasury, were total falsehoods aimed at misinforming this Court of the true facts. Had this Court been informed of any of these disingenuous fabrications, this Court would never have released the funds on deposit with the County Treasury - clearly

those funds, under the within circumstances, could never be lawfully released to plaintiff or plaintiff's counsel.

This Court finds that plaintiff and plaintiff's counsel do not come into this proceeding with clean hands.

The cross-motion by plaintiff to stay this action and to consolidate it with *Papa v Papa* (Index No. 16220/98) is denied. Since the other action has been settled and discontinued, there is no basis for either form of relief.

Accordingly, it is,

ORDERED that CPC, pursuant to CPLR 1012 and 1013, is entitled to intervene as a necessary party to this action, and it is

FURTHER ORDERED that plaintiff is directed, within five days of this Order, under Penalty of Contempt, to do equity in restitution by depositing back to the Westchester County Treasurer all such funds removed from said Treasurer with this Court's Order of August 1, 2001, which this Court previously ordered and which this Court maintains was based on false, misleading and inaccurate information, all pursuant to CPLR 5015(d) and it is

FURTHER ORDERED that within five days of such deposit, plaintiff shall file proof of the deposit with this Court (Room 1806), and it is

FURTHER ORDERED that this Court herein grants a preliminary injunction against plaintiff enjoining plaintiff from disbursing, dissipating, spending, secreting or otherwise transferring or hypothecating surplus monies obtained by him or from transferring, dissipating, distributing, secreting or hypothecating assets obtained with the surplus monies together

with such other and further relief as may be just and proper, and it is

FURTHER ORDERED that pending any final hearing and determination of this motion, plaintiff Florin C. Papa a/ka Florin C. Popescu, is hereby enjoined from spending, dissipating, transferring, distributing, secreting or hypothecating any portion of the surplus money obtained by him under the August 1, 2001 Order of the Court and from dissipating, selling, transferring, distributing, secreting or hypothecating any assets purchased or acquired with or by the surplus monies, and it is

FURTHER ORDERED that the cross-motion to stay and consolidate is denied.

ENTER:

FILED
Entered
on 5/1/03
Westchester
County Clerk

s/ Hon. W. Denis Donovan
HON. W. DENIS DONOVAN
JUSTICE SUPREME COURT

DATED: April 28th, 2003
White Plains, New York

TO: CERTILMAN, BALIN, ADLER & HYMAN LLP
90 Merrick Avenue
East Meadow, NY 11554
Attorneys for Intervenor, CPC

CHARLES RUDD MACKENZIE, ESQ.
135 Southside Avenue
Hastings-On-Hudson, NY 10706
Attorney for Plaintiff